No. 7773

IN EQUITY

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANTS, CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, CITY OFFICERS, AND MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.

No. .....

IN EQUITY

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANTS, CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, CITY OFFICERS, AND MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.

INDEX

AUTHORITIES CITED

No. .....

IN EQUITY

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, IDAHO, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. McEUEN and C. C. HODGE, Members of the City Council of said City of Coeur d'Alene, Idaho, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

STATEMENT.

This appeal is from an Order granting an Injunction Pendente Lite (R. p. 190-196) after Motions to dismiss the Amended Bill of Complaint for lack of equity (R. p. 157-159) had been denied (R. p. 188), and the District Judge had held in his opinion that a loan and grant to be made to the City of Coeur d'Alene by the Federal Government for the construction of a municipal light plant and distribution system would be illegal and unauthorized. (R. p. 188).

The hearing before the District Judge was upon questions of law raised by appellants' Motions to dismiss

the Amended Bill of Complaint (R. p. 165), and the injunction order followed a determination of these questions adverse to appellants (R. p. 164-188). The District Judge held that the averments in the Amended Bill of Complaint entitled appellee to injunctive relief as a matter of law. (R. p. 165).

The averments in the Amended Bill of Complaint are voluminous, and in the interest of brevity, an attempt will be made to group the essential facts alleged with respect to the controlling principles of law.

The City of Coeur d'Alene is a municipal corporation in the State of Idaho (R. p. 8), with a population in 1930 of 8297, according to the Federal census. Pursuant to an Ordinance enacted by the City Council of the City of Coeur d'Alene on the 2nd day of November, 1933, and approved by the Mayor on the same day (R. p. 16), an election was held on December 12, 1933, submitting to the voters a proposition of incurring a municipal indebtedness of Three Hundred Thousand ($300,000.00) Dollars, for the purpose of paying the costs and expenses of the acquisition by purchase or construction of an electric power plant and lighting system (R. p. 17). At the same election a proposition for incurring a municipal indebtedness of Three Hundred Thousand ($300,000.00) Dollars, by the issuance of municipal bonds of said City for the purpose of paying the costs and expenses of the acquisition by purchase or construction of a water works by said City was also submitted to the voters. (R. p. 17).

Thereafter, at a special meeting of the City Council

of the City of Coeur d'Alene, it was declared that the said bond election had carried by the necessary two-thirds (2/3) majority, and the City Council adopted a motion that the Mayor and other designated city officials be authorized to prepare an application to be made to the Federal Emergency Administrator of Public Works for funds to contruct a water works system and light and power plant in the City of Coeur d'Alene. (R. p. 18).

The Federal Emergency Administration of Public Works has approved the application made by the City of Coeur d'Alene, and will shortly advance funds to the City in the amount of Three Hundred and Thirty-seven Thousand Five Hundred and Eighty ($337,580.00) Dollars, for the purpose of constructing an electric power plant and power distribution system, partly as a loan through the sale of general obligation bonds of the City to the Federal Government, and partly as a grant amounting to thirty percent (30%) of the total cost of labor and materials, and the City will undertake the construction of a municipal power and generating plant and electric distribution system by the application of the proceeds of the loan and grant, and the City and its officers propose and threaten to enter into a contract with said Federal Emergency Administration of Public Works by the terms of which the City will undertake and agree to construct a Diesel engine electric power plant and power distribution system, costing at least the sum of $337,580.00. (R. p. 20).

The right of the appellee to maintain this suit and to

attack the legality of the proposed loan and grant, and the constitutionality of the law under which the loan and grant are authorized, is based on two grounds:

First: That appellee is a public service corporation (R. p. 10) owning and operating an electric power and light distribution system in the City of Coeur d'Alene, under a franchise granted by the Village of Coeur d'Alene, Idaho, to the predecessor of appellee, (R. p. 13), which franchise runs until 1953 and is not exclusive, (R. p. 54-57) and under which franchise electric service has been rendered the City of Coeur d'Alene by appellee and its predecessor in interest for more than thirty years, and appellee now possesses lawful and valid operating rights for the conducting of its electric business in said City. (R. p. 15).

Second: That appellee is a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, of the City of Coeur d'Alene, and of other taxing districts in the State of Idaho, and is the owner of extensive properties subject to taxation by said taxing authorities. (R. p. 15).

The appellee attacks the validity of the election at which the proposition of incurring a municipal indebtedness of Three Hundred Thousand ($300,000.00) Dollars, and the issuance of municipal bonds of the City for the purpose of paying the costs and expenses of the acquisition by purchase or construction of an electric power plant and lighting system was approved by two-thirds (2/3) of the voters of said City, on two grounds:

First: That because of misleading, erroneous and false statements, advertisements and information put out by the mayor and Members of the City Council of the defendant city, and in the report of the Engineer employed by the City to the effect that the bond issue of $300.000.00 would result in no requirement for the payment of any sum, either principal or interest, through taxation, such a fraud against the voters existed that it vitiated the election and rendered said bonds illegal and unlawful. (R. p. 28 and 58).

Second: That because of misleading, erroneous and false statements, advertisements and information put out by the Mayor and Members of the City Council of the defendant City in concealing from the citizens and voters that two sections of the city under the proposed plan would not be included within the area to be served by said proposed municipal light and power system, such a fraud against the voters existed that it vitiated the election and rendered the bonds illegal and unlawful. (R. p. 29 and 58).

The validity of the proposed loan and grant is challenged upon the following grounds:

First: That Title II of the National Industrial Recovery Act is unconstitutional (R. p. 64 and 67).

Second: That Title II of the National Industrial Recovery Act does not authorize the Federal Emergency Administration of Public Works to loan moneys or give moneys of the Federal Government for the building of

municipal Diesel engine power generating plants and electric distribution systems. (R. p. 60).

Third: That the Federal Emergency Administrator of Public Works has abused his discretion in including this project among those to be financed with funds of the United States under the provisions of Sections 202 and 203 of the National Industrial Recovery Act. (R. p. 68-69).

Fourth: That the indebtedness created is in violation of Section 3 of Article VIII of the Constitution of Idaho in that the plan provides for the creation of an indebtedness and/or liability in excess of $300,000.00 for the plant and distribution system. (R. p. 59).

SPECIFICATION OF ERRORS.

Appellants make the following Specification of Errors upon which they will rely upon the prosecution of their appeal from the Order granting Injunction Pendente Lite made and entered in the above entitled cause on the 31st day of December, A. D. 1934, in the District Court of the United States for the District of Idaho, Northern Division, to-wit:

1. The Court erred in granting an Injunction Pendente Lite in said cause.

2. The Court erred in finding, holding and deciding that the proposed contract providing for a loan and grant is not for the purpose of unemployment relief but to foster and encourage muncipal ownership, and to regulate rates and charges for electric service.

3. The Court erred in finding, holding and deciding that the proposed contract providing for a loan and grant is an illegal attempt to usurp the functions and powers of the State of Idaho and beyond the powers of the National Government.

4. The Court erred in finding, holding and deciding that the proposed loan and grant of funds of the United States by the Federal Emergency Administration of Public Works for said purpose is unauthorized and unconstitutional.

5. The Court erred in finding, holding and deciding that said loan and grant is illegal and/or unauthorized.

6. The Court erred in finding, holding and deciding that said loan and grant amounts to the incurring of an indebtedness and/or liability in excess of $300,000.00, in violation of the Constitution of the State of Idaho.

7. The Court erred in finding, holding and deciding that if said loan is made it will result in direct and/or immediate and/or irreparable loss and damage to the plaintiff.

8. The Court erred in finding, holding and deciding that the Amended Bill of Complaint of plaintiff stated any grounds for the granting of an Injuction Pendente Lite.

9. The Court erred in finding, holding and deciding that the Amended Bill of Complaint stated facts suffi-

cient to constitute a valid cause of action in equity, or to entitle the plaintiff to equitable relief.

10. The Court erred in finding, holding and deciding that the Amended Bill of Complaint states any matter of equity entitling the plaintiff to the relief prayed for therein, or to any relief against the defendants.

11. The Court erred in denying the motion of the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, to dismiss the Amended Bill of Complaint.

12. The Court erred in denying the motion of the defendants, City of Coeur d'Alene, Idaho, a municipal corporation, the City officers and the Members of the City Council of said City of Coeur d'Alene, Idaho, to dismiss the Amended Bill of Complaint.

ARGUMENT.

APPELLEE WILL SUFFER NO DIRECT INJURY, AND THEREFORE HAS NO STANDING TO QUESTION CONSTITUTIONALITY OF NATIONAL INDUSTRIAL RECOVERY ACT.

The rule that a direct injury must be shown as a basis for challenging the constitutionality of an Act of Congress has been established by many decisions of the Supreme Court of the United States.

Frothingham v. Mellon,
262 U. S. 447,

Williams v. Ricley,
280 U. S. 78-80,

Heald v. District of Columbia,
259 U. S. 114,

Fairchild v. Hughes,
258 U. S. 126,

City of Allegan v. Consumers Power Company,
71 Federal (2d) 477.

Appellee contends that it will suffer irreparable injury, disruption and damage if it should lose its electric utility business in the City of Coeur d'Alene through the alleged illegal and wrongful acts of the defendants. (R. p. 29). But appellee has no legal monopoly of the electric utility business in Coeur d'Alene. Its franchise is not exclusive (R. p. 84-87). The City is not a corporation which is required to secure a certificate of convenience and necessity from the Public Utilities Commission of the State of Idaho before constructing a competing system, as municipal corporations are expressly excepted from the corporations subject to the Public Utilities Commission by Section 59-104, Idaho Code Annotated, which reads as follows:

> "59-104. The term "corporation" when used in this Act includes a corporation, a company, an association and a joint stock association, but does not include a municipal corporation. . . . ."

In construing this Section the Supreme Court of Idaho has held that municipally owned utilities are not under the jurisdiction of the Public Utilities Commission.

Kiefer v. City of Idaho Falls,
49 Ida. 458; 289 Pac. 81.

The construction and operation of a municipal light

plant and distribution system by the City of Coeur d'Alene cannot result in a legal injury to appellee as the City will be doing only what it has a lawful right to do. Yet the only injury which appellee can sustain will result from this legal action on the part of the City, its injury, if any, will result from the construction and operation of a competitive electric lighting system.

As a public utility, owning and operating an electric lighting plant and distribution system in the City of Coeur d'Alene, the appellee will sustain no direct injury through the financing of the competitive municipal plant by the Federal Government. The source of the funds with which the municipal plant will be financed is of no concern to appellee as a public utility whose property and business may suffer injury and damage through competition of a municipal plant. If it will suffer injury by the construction of a municipal lighting plant, financed by Government funds, it would be injured to the same extent if the funds were received from other sources. The source of the funds has no connection with the threatened injury to the property and business of appellee.

Under the provisions of the Municipal Bond Law of the State of Idaho, the bonds which have been authorized must be sold to the bidder making the best bid therefor, subject to the right of the Mayor and City Council to reject any and all bids.

"Section 55-214, Idaho Code Annotated . . . . . .

"All other bonds shall be sold after notice given as herein provided, at public sale at a regular or special

> meeting of the governing body of the issuer corporation, and any funding or refunding bonds shall be sold in like manner, if so ordered by any such governing body. No bond shall be sold for less than par and accrued interest to date of delivery."
>
> "Section 55-216, Idaho Code Annotated . . . . "the said bonds shall be sold to the bidder making the best bid therefor, subject, as aforesaid, to the right of any such governing body to reject any and all bids and to re-advertise any such bonds for sale in the manner herein prescribed until said bonds have been sold."

It would be as reasonable to contend that a bank purchasing the bonds from the City and thereby providing funds for the financing of the plant was responsible for the injury which appellee fears from a competitive plant as it is to contend that the purchase of the bonds by the Federal Government is the cause of the injury. An injury or damage resulting from competition authorized by law cannot be a legal injury.

It is the policy of the State of Idaho to permit its cities and villiages to own and operate their own municipal light and water systems. No Statute has been enacted restricting such right. There is no limitation on the amount of indebtedness that can be incurred for such purposes so long as the constitutional requirements are complied with. No legislative intention to protect the private owners of public utilities from competitive municipal plants is apparent. The risk of competition from a municipally owned plant is inherent in the nature of the business in which appellee is engaged.

The threatened injury to appellee as a taxpayer is based on the contention that the loan and grant are illegal and therefore that at some future time the City may be required to repay the amounts received and collect taxes on the property of appellee for that purpose. On no other theory can appellee claim injury as a taxpayer.

In *City of Allegan v. Consumers Power Company*, 71 Federal (2d) 477, the Circuit Court of Appeals of the Sixth Circuit reversed an interlocutory injunction issued by the District Court of the United States for the Western District of Michigan, and held, among other things, that the plaintiff was without right to raise any question either as to the effect of or the constitutionality of the National Industrial Recovery Act in that suit, stating in the opinion:

> "The injury which is here claimed to threaten the utility is said to arise out of the possibility that the loan and grant to the City by the Public Works Administration may be declared invalid and that the government may demand immediate return of its money . . . . .
>
> "It has long been settled that the Courts have no power *per se* to review and annul Acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for such direct injury suffered or theatened, presenting a justifiable issue is made to rest upon such Act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. The party who invokes the power must be able to show not only that the statute in invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its

> enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The fear that the Government might demand immediate return of the money advanced if the loan and grant should be declared invalid is more imaginary than real. It is based upon the assumption that the Government would not be able to recover the money loaned out of the bonds, and on the further assumption that such a demand could be enforced. If the loan should be held invalid because of lack of power of the Administrator to make the loan, the City would not thereby be relieved of its obligation to pay the bonds as they mature. On the other hand, if the invalidity arose from the lack of power of the City to incur the indebtedness because of the constitutional prohibition, then there could be no obligation to repay because the indebtedness would be void.

It is expressly provided in Section 3 of Article VIII of the Constitution of Idaho as follows:

> "An indebtedness or liability incurred contrary to this provision shall be void."

In construing this section of the Constitution, the Supreme Court of Idaho has uniformly held that any obligation incurred in violation of the section is void and unenforceable.

Ada County v. Bullen Bridge Co.,
5 Ida. 79, 47 Pac. 818,

Dunbar v. Board of County Commissioners,
5 Ida. 407, 49 Pac. 409,

McNutt v. Lemhi County,

12 Ida. 63, 84 Pac. 1054,

Boise Dev. Co. v. Boise City,
26 Ida. 347, 143 Pac. 531.

To the same effect is the decision in the case of *Dexter-Horton etc. Bank v. Clearwater County,* 235 Fed. 743.

It has been held by both State and Federal Courts in Idaho that a contract void under this section of the Constitution cannot be enforced either as an express or an implied contract.

Deer Creek Highway Dist. v. Doumecq Highway Dist.
37 Ida. 601, 218 Pac. 371.

Gillette-Herzog Mfg. Co. v. Canyon County,
85 Fed. 396.

Since the City can incur an indebtedness only pursuant to law, an obligation incurred outside of the law is not a debt.

Litchfield v. Ballon,
114 U. S. 190,

Buchanan v. Litchfield,
102 U. S. 578,

Greenburg Iron Co. v. City of Abberville,
2 Fed. (2d) 559,

Eaton v. Sheawassee County,
218 Fed. 592.

With respect to the grant,—it is made upon conditions which must be complied with by the City and pursuant to an Act of Congress presumed to be constitutional and valid. After the conditions have been per-

formed by the City, the status quo of the parties cannot be restored.

The decisions of the supreme Court and of other Federal Courts to the effect that money paid out without authority of law by an official of the United States may be recovered from the recipient in an action for money had and received, are not in point. None of those cases involved a grant of money made pursuant to an Act of Congress thereafter held invalid. They involved payments made with out any authority of law or under an erroneous construction of a statute.

A citizen is presumed to know the law but he is not charged with knowledge that a statute which is presumed to be constitutional will subsequently be declared unconstitutional. He is entitled to act upon the presumption of constitutionality which applies to every statute until it has been declared unconstitutional by the Courts.

United States v. Realty Company,
163 U. S. 427-438.

The possibility of the recovery from the City of any moneys received through the loan and grant and the levy of an assessment to provide funds to pay a judgment therefor, is so remote and conjectural that it could not constitute a direct injury. It is illusion created for the purposes of a law suit rather than a fact reasonably to be anticipated or feared.

THE VALIDITY OF THE BOND ELECTION CAN-

NOT BE ATTACKED BECAUSE OF MISLEADING, ERRONEOUS OR FALSE STATEMENTS OR INDUCEMENTS HELD OUT TO INFLUENCE THE VOTERS.

Humphrey v. Board of Com'rs, of City of Pratt,
144 Pac. (Kan) 197,

Murphy v. City of Spokane,
117 Pac. (Wn) 476-479,

Epping v. City of Columbus,
43 S. E. (Ga) 803-812.

The attack on the validity of the election at which the bonds were authorized by the voters is based solely on elleged misleading erroneous and false statements, advertisements and information put out by the Mayor and members of the City Council of the City to the effect that the bond issue of $300,000.00 would result in no requirement for the payment of any sum, either principal or interest, through taxation, (R. p. 28), and the concealment from the voters that two sections of the City were omitted from any distribution service. (R. p. 26).

The validity of an election cannot be assailed on such grounds.

In Humphrey v. Board of Com'rs of City of Pratt, *supra,* it was alleged that the bond election was carried through false representations and the Court said that unscrupulous campaign methods must be met in some other way than by an action to enjoin issuance and sale of the bonds.

In Epping v. City of Columbus, *supra,* a similar

contention was made and was disposed of by the Court in the following language:

> "It is contended that the bonds should not have been validated because at least 32 negro voters who voted in favor of the issuance of bonds were induced to do so by false and fraudulent statements made to them by officers of the town and others interested in the issuance of the bonds. This is no ground for refusing to validate the issue of the bonds. The courts cannot inquire into the motives prompting persons to vote on questions of this character, where the voter freely and voluntarily exercised this right. Inducements held out to influence a voter, although false and fraudulent, will not invalidate the election. The rule might be different where it appeared that by force and fraud the voter was compelled to vote in a way he did not desire to vote. The allegation of the objection in the present case did not bring the case within the purview of this last statement, even if that would be the rule. Where the election is regularly called and regularly held, and the voters freely and voluntarily exercise their right to vote, the election will not be invalidated simply because some of them have been misled by some one interested in the result of the election."

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS CONSTITUTIONAL.

(a) The subject matter of the Act is within the Constitution of the United States, Article I, Section 8.

Constitution of the United States.

Constitution of the United States, ArticleI, Section 8.

McCulloch v. Maryland,
4 Wheat. 316, 401.

Field v. Clark,
143 U. S. 649, 693.

United States v. Realty Company,
163 U. S. 427.

Allen v. Smith,
173 U. S. 389.

Legal Tender cases,
12 Wall. 457, 532.

Massachusetts v. Mellon,
262 U. S. 447, 457.

U. S. v. Gettysburg Railway Co.,
160 U. S. 668.

Storey's Commentaries,
Fifth Ed. p. 675.

(b) The act is not an unconstitutional delegation to the President of the legislative powers of Congress.

Wayman v. Southard,
10 Wheat. 1, 43.

Field v. Clark,
143 U. S. 649.

Buttfield v. Stranahan,
192 U. S. 470, 496.

Union Bridge Co. v. United States,
204 U. S. 364, 386.

United States v. Grimaud,
220 U. S. 506.

Hampton & Company vs. United States,
276 U. S. 394.

McKinley v. United States,
249 U. S. 397.

United States v. Chemical Foundation,
272 U. S. 1, 12.

Federal Radio Commission v. Nelson Bros. Band & Mortgage Company,
289 U. S. 266.

Panama Refining Co. v. Ryan,
..... U. S. ....., 79, L. ed. 223, 235.

(a) The Constitution of the United States, Article 1, Section 8 provides:

> "Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States:
>
> . . . . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The title to the National Industrial Recovery Act reads as follows:

> "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."

The declaration of policy declared in Section 1 of Title I of the Act reads as follows:

> "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organiza-

tion of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible untilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Title II of the act is entitled "Public Works and Construction Projects." The provisions of the first section of Title II (Section 201) authorize the President to create a Federal Emergency Administration of Public Works "to effectuate the purpose of this title," and provide that all the powers of the "Administration" so created shall be exercised by a Federal Emergency Administrator of Public Works. The President is empowered to establish such agencies as he may find necessary, and to delegate any of his functions and powers under Title II to such officers, agents and employees as he may designate or appoint.

Pursuant to this authority, the President has created the Federal Emergency Administration of Public Works, and has delegated to the Administrator sufficient of his functions and powers under the Act to enable him to execute the law.

Under the provisions of Section 202 of Title II of the Act, the Administrator, under the direction of the

President, is commanded to prepare a comprehensive program of public works which shall include among other things, the various types of projects therein enumerated.

It appears from the above and other provisions of the Act, that by Title II of the National Industrial Recovery Act, the Congress found and declared the following (among others) to be national purposes:

1. The preparation of a comprehensive program of public works, coextensive with the boundaries of the United States, and including not only the several States but also Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

2. A prompt increase of employment by means of Federal construction or Federal aid in financing the construction of projects included in the comprehensive program of public works prepared by the Administrator pursuant to the mandate of the Act.

3. The promotion of the thirty-hour week and consequent spreading of employment.

4. Increasing purchasing power by requiring the payment of just and reasonable wages.

5. Preference for veterans in the employment of labor on the public works projects.

Under the power to lay and collect taxes to provide for the common defense and general welfare of the United States (and by necessary implication, to expend the moneys collected from taxes) and to make all laws

which are necessary and proper for carrying into execution the powers expressly conferred and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof, the Congress has, since the foundation of the Government, declared certain purposes national, and has appropriated federal moneys to carry out such purposes. It is the function of Congress to determine the purposes which will promote the general welfare of the nation and to make appropriations for such purposes.

Executive and legislative construction of constitutional provisions always has been and should be given great consideration by the Courts.

Downes v. Bidwell,
182 U. S. 244, 286.

United States v. Midwest Oil Company,
236 U. S. 459, 472.

Field v. Clark. Supra.

As was said by Chief Justice Marshall in McCulloch v. Maryland, *supra*:

> "An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."

It appears to have been the concensus of executive, legislative and judicial opinion during the history of our country that Congress has the power to appropriate money to carry out purposes which it has declared national in scope.

A search of the cases fails to disclose any decision by the Supreme Court adverse to such an interpretation of the general welfare clause. In only a few instances has the power of Congress been challenged.

In U. S. v. Gettysburg Railway Co., *supra*, the power of the Federal Government to condemn the land on which the Battle of Gettysburg was fought for the purpose of laying out a national park was questioned. The Court held that the power of condemnation resulted from the power of taxation to be exercised for the common defense and the general welfare, and that the use to which the condemned land was to be put was one so closely connected with the general welfare of the nation as to be within the power granted Congress by the Constitution for the purpose of protecting and preserving the whole country.

In United States v. Realty Company, *supra*, the power of Congress to appropriate money to pay a bounty to sugar manufacturers producing sugar meeting a certain test was challenged. The Act of Congress making such appropriation rested upon the power to levy taxes to provide for the general welfare. In the earlier case of Field v. Clark, Supra, the Supreme Court had declined to pass on the question whether the constitution empowered Congress to grant bounties to sugar producers. In United States v. Realty Company, the immediate question before the Court was whether the United States, having promised to pay a bounty, even if it had no power to do so, had thereby created a debt which Congress had power to discharge by an appropriation. The Court

decided that Congress had the power to appropriate money to pay a debt arising only from the moral obligation of the nation, "although the debt could obtain no recognition in a court of law."

It is a matter of common knowledge that vast unemployment was a grave condition confronting the country at the time the National Industrial Recovery Act was passed. The purpose of Congress "to reduce and relieve unemployment" as stated in the declaration of policy set forth in Section 1 of Title I of the Act, was the primary purpose for the enactment of the law. Senator Wagner, the member of the Committee in charge of the bill in the United States Senate stated:

> "Mr. President, the National Industrial Recovery Bill is an employment measure. Its single objective is to speed the restoration of normal conditions of employment at wage scales sufficient to provide a comfort and decent level of living."
>
> 77 Cong. Rec. 51-52, (1933)

The rule that Congressional debates will not ordinarily be considered by a Court interpreting a Federal statute does not apply to remarks made by a member of the Committee in charge of the bill.

> *Binns v. United States,*
> 194 U. S. 486, 495,
>
> 27 Ops. Attorney Gen. (1908) 68, 78.

Certainly, the relief of unemployment resulting from the existence of a great national depression and a breakdown of the economic system, was a national purpose.

The plan by which unemployment was to be relieved was for Congress to determine, and such determination was the performance of a legislative function, and is binding on the Courts.

The preparation of a "comprehensive program of public works" was one of the means which Congress determined would assist in the relief of unemployment, and thereby promote the general welfare of the nation.

(b) The powers delegated to the President by Title II of the National Industrial Recovery Act are purely administrative. He is charged with the duty of executing the law. The Congress has not abdicated any legislative function. All essential legislative functions are embraced within the law itself, and only executive functions remain to be exercised in the administration of the law.

The Act meets the requirements laid down by the Supreme Court of the United States in its latest expression on the subject, in the case of Panama Refining Co. v. Ryon, *supra*, in which it is said:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

> Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

In the above case, the Supreme Court held Section 9, Subsection (c) of Title I of the National Industrial Recovery act unconstitutional on the ground that it was a delegation of legislative functions to the President. The Subsection authorizes the President to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof, produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed by any board, commission, officer or any other duly authorized agency of a State. Any violation of an order issued by the President under the provisions of Subsection (c) was made a criminal offense, punishable by fine or imprisonment or both. As stated by the Court, the Section "gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

Panama Refining Co. v. Ryan, *supra*, p 229.

The distinction between the powers attempted to be conferred by Subsection (c) of Section 9 of Title I of the Act, and those conferred by Title II is apparent, and is illustrated b the cases cited in the opinion, in which the difference between legislative functions and executive actions is pointed out.

Thus in Buttfield v. Stanahan, *supra*, an Act of Congress was upheld which authorized the Secretary of the Treasury, upon the recommendation of a board of experts to "establish uniform standards of purity, quality and fitness for the consumption of all kinds of tea imported into the United States," the Court said "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the Statute."

In Union Bridge Co. v. United States, *supra*, the Secretary of War was given authority to determine whether bridges and other structures constituted unreasonable obstructions to navigation, and to remove such structures, and it was held that by the statute, the Congress declared: "a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule."

In Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., *supra*, the Court in construing the provisions of the Radio Act held that the standard set up was not so indefinite "as to confer an unlimited power."

In Field v. Clark, *supra*, it was contended that the statute involved was an unconstitutional delegation of legislative powers, but the Court held that "what the President was required to do was merely in execution of the Act of Congress," and this statement was approved in the later case of Hampton & Co. v. United States, *supra* involving the constitutionality of the flexible tariff pro-

vision, in which the Court said:

> "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute, and directing details of its execution, even to the extent of providing for penalizing a breach of such regulations."

Title II of the National Industrial Recovery Act vests in the President, through agencies to be selected by him, the power to direct the details of the execution of the law. This is manifestly a function of the executive branch of the Government. Congress had proceeded as far as it could go in the exercise of its legislative functions when it prescribed the general classes of projects to be included in the comprehensive program of public works to be prepared and carried out to effectuate the purposes of the law. It laid down the rule and provided the standard for the executive to follow in the selection of the projects to be included in the comprehensive program of public works, and this was as far as it could practically go in the exercise of its legislative functions because the legislation had to be adapted to complex conditions involving a host of details with which the Congress could not deal directly.

Title II of the National Industrial Recovery Act relates solely to the expenditure of public moneys "with a view to increasing employment quickly," to promote the general welfare. The subject matter is entirely different

from that embraced in Title I of the Act. Title II does not purport to regulate the actions or conduct of individual citizens in their private capacities. It does not empower the President to make an orders such as those provided for in Subsection (c) of Section 9 of Title I of the Act, a violation of which is punishable by fine or imprisonment.

The powers granted to the President by Title II are within the rule laid down by the Supreme Court in the cases cited.

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT AUTHORIZES THE FINANCING OF THIS PROJECT.

A "comprehensive program of public works" is necessarily made up of many component parts. Its nature requires that many projects be included, otherwise it would not be a "comprehensive program," but limited in its scope. It cannot consist of one giant project, coextensive with the boundaries of the nation. It is a "program" of public works,—not merely one great Federal project.

The municipal lighting system in Coeur d'Alene is only one of many projects that have been included in the "comprehensive program." Considered by itself, it might not go far toward accomplishing the purpose of the Act, but when combined with hundreds of other projects of a similar character scattered throughout the length and breadth of the land, it becomes a part of the national program.

The "comprehensive program of public works" authorized by the Act, includes by express enumeration (among other things) the following:

> "(a) Construction . . . of any publicly owned instrumentalities and facilities."
>
> (c) Any projects of the character heretofore constructed or carried on either directly or by public authority or with public aid to serve the interests of the general public."

The Coeur d'Alene project is a publicly owned instrumentality or facility. Also, it is a project of the character heretofore constructed and carried on by public authority.

Section 203 (a) of the National Industrial Recovery Act provides:

> "Sec. 203 (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or thru such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to Section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities or other public bodies for the construction, repair or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; . . . ."

The Coeur d'Alene project has been included in the comprehensive program of public works which the Administrator has prepared under the direction of the President pursuant to the authority granted by Title

II of the National Industrial Recovery Act.

As a part of the general program, the construction of the project will assist in accomplishing the purposes of the law. While it is true that the labor expended upon this project alone will not relieve unemployment in the nation, it will furnish employment to some, and in conjunction with all the other projects of a similar character, financed in the same manner, the relief of unemployment will be materially advanced. The employment furnished will not be limited to the labor performed locally in the construction of the project but will extend to the labor performed in the factories and industries where the machinery and equipment utilized in the project will be manufactured.

THE COURTS WILL NOT INTERFERE WITH THE EXERCISE OF DISCRETION BY EXECUTIVE OFFICERS

It is well settled that the Courts may not review the exercise of adminstrative discretion reposed in officers of the Government by Act of Congress.

United States v. Chemical Foundation,
272 U. S. 1, 14, 15.

Dakota Cent. Teleph. Co. v. South Dakota,
250 U. S. 163, 182, 184.

Louisiana v. MacAdoo,
234 U. S. 627.

In United States v. Chemical Foundation, *supra,* the Court said that the presumption of regularity supports the official acts of public officers, and in the absence of

clear evidence to the contrary, Courts presume that they have properly discharged their official duties, and stated in the opinion:

> "Under that presumption it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the Courts."

In Dakota Cent. Teleph. Co. v. South Dakota, *supra*, the Court said that the contention made assailed the motives which it is asserted induced the exercise of power by the President, and then stated in the opinion:

> "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this Court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Under the provisions of the Act, it is the province of the Administrator to determine, under the direction of the President, whether or not a particular project shall be included in the comprehensive program of public works and financial assistance furnished by the Government. The determination of this question is the exercise of an executive function which should not, and under the decisions can not, be reviewed by the Courts. It is an exercise of discretion which is not the subject of judicial review.

In Louisiana v. McAdoo, *Supra*, the Court said:

> "If the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the Court will refuse to substitute its judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the orderly functions of government."

THE LOAN AND GRANT IS NOT IN VIOLATION OF SECTION 3 ARTICLE VIII OF THE CONSTITUTION OF IDAHO.

Section 3 of Article VIII of the Constitution of Idaho reads as follows:

> "3. Limitations on county and municipal indebtedness. No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: PROVIDED, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

It is contended that because the City of Coeur d'Alene proposes to expend $337,580.00 in the construction of a

municipal electric power plant and distribution system, and has voted bonds for $300,000.00 for that purpose, that the plan is in violation of the constitutional limittations.

It is not contended, as we understand the allegations of the Bill, that the requirements of Section 3, Article VIII of the Constiution of Idaho have not been complied with by securing the assent of two-thirds of the qualified electors of the city voting at an alection held for that purpose, and by providing for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. There are no allegations in the Bill questioning such compliance.

It appears, therefore, that the only basis for the contention is that the cost of the system will exceed the amount of the bonds authorized at the election.

It is not proposed to create an indebtedness or liability amountg to $337,580.00, or even in the amount of the bonds authorized at the election. The cost of the labor and materials is estimated at the sum of $276,512.91, (R. p. 19) and a grant of 30 per cent of the total cost of labor and materials, plus contractors' profits, would amount to $91,230.00. (R. p. 20). The grant does not imply any obligation of repayment on the part of the City except on the theory of illegality and consequently an implied agreement to repay, heretofore discussed in this Brief. If there is no obligation on the part of the City to

repay the grant it would not constitute an idebtedness or liability.

It is only an indebtedness or liability that falls within the condemnation of the constitutional limitation. It makes no difference how much the improvement costs if an indebtedness or liability does not arise from the transaction. The City is not prohibited from accepting a gift or grant or from constructing any improvement at any cost if it can secure the funds for the project without incurring an indebtedness or libility to repay them.

Incidentally, it is contended that the proposed loan and grant are in violation of the Fifth, Tenth and Fourteenth Amendments to the Constitution of the United States, but these contentions have so little foundation to support them that they were ignored by the lower Court, and do not require any discussion.

Repectfully submitted,

W. B. McFARLAND

C. H. POTTS
Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.